**SELECT COMMITTEE ON SECURITY AND JUSTICE**

THE ELECTORAL AMENDMENT BILL: COMMISSION RESPONSES TO SUBMISSIONS

1. **Conception of Proportionality**
   1. The Constitutional Court ordered the amendment of the Electoral Act, to facilitate participation of independents. The participation of independents is still within a constitutional scheme that results in general, proportional representation.
   2. Proportional representation systems are subject to distortions with the introduction of elements such as the participation of independents. The only way to include independents in our current two-tier compensatory system is to allow them to obtain seats that they win and to regard that as a component, with proportionality in respect of the remaining seats applying to the parties that gain representation. This will grant representation to independents and maintain intra-party proportionality.
   3. The “in general” element permits a legal threshold that allows the allocation of only five seats not initially allocated based on the “largest remainders” method. From seat six onwards, parties already allocated a seat gain representation based on the highest average number of votes for seats provisionally allocated. This is to prevent absurd situations of a party with very little support gaining representation.
   4. The Commission is of the view that the Bill meets the requirements of election results yielding, in general, proportional representation. The models illustrating the basis of the conclusion are discussed in turn.
2. **The Present System**
   1. To assess the outcomes of the Electoral Amendment Bill, it is best to, in the first instance, reflect on the outcomes of the current electoral system.
   2. Annexure 1 reflects the official results of the 2019 national election. It will be noted that only the largest party is accurately represented and that all the other parties are slightly overrepresented. This variation comes about due to the inclusion of the 309 727 “wasted” votes cast for 34 parties that did not gain representation. In all cases, the minor variance is, however, less than 0,25%, that being the threshold for gaining a seat.
   3. Annexure 2 reflects the percentage support each represented party received in the 2019 election if the votes for unrepresented parties are discarded. The two largest parties are underrepresented and the rest are slightly overrepresented.
   4. The discarding of some votes does not apply to the present system and this example is only included to illustrate that the discarding of some votes influences outcomes. The principle that it illustrates affects any model that may be constructed in respect of the Bill. With these models, all votes are taken into account to determine outcomes in the regions. But, with the determination of the compensatory element, the votes for independent candidates are excluded. This exclusion leads to a lower quota than would otherwise have applied and to allocating a larger number of provisional seats during the first round of allocations. The reason why votes for independents are discarded whilst those for unsuccessful parties are not is, because, for successful independents, seats are already finally allocated.
3. **Implementation of the Electoral Amendment Bill**
   1. Annexures 3 and 4 reflect situations where three and six independents, respectively, gain seats. The results of the 2019 elections were used with the data relating to three and four parties, respectively, to construct the two models. They are parties that gained regional representation (where independents would be competing), and in the models, their votes are attributed to independent candidates.
   2. To accommodate the introduction of two ballot papers in the models, it had to be accepted, with the available data, that a similar number of votes were cast regionally and nationally. This is an anomaly, but not big enough to disturb the validity of the trend that is being illustrated. The totals for party and total votes differ in the two models depending on the number of votes for independents discarded in the list compensatory calculations.
   3. The result is not a pretence of an actual situation but is accurate enough to discern trends and is intended only for that purpose. The results of the 2019 regional elections were not recalculated and the official IEC published information was used since the Bill does not change anything there. With the subsequent list compensatory calculations, all steps were included in the models to illustrate that the mathematically most possible proportional outcome is arrived at.
   4. In the model (Annexure 3) where three independents gain seats (all with the largest remainder method), there are relatively minor variations with the current position. The biggest party gained three seats compared with the current situation, with other consequential adjustments following. The largest party is still slightly under-represented based on its share of the votes for parties. Again, the calculation for the 57.5% of the vote it gained in the 2019 election included the 309 727 votes for parties that did not gain representation. If that is disregarded for comparison purposes and only the proportion of the votes for successful parties is considered, it gained 58,5% of the party vote in 2019. The difference between intra-party and overall support represents at least three seats in a 400-member Assembly and probably enables a comparison of apples with apples.
   5. In the model (Annexure 4), where six independents gain seats (once again, all with the largest remainder method), the variation becomes bigger; the largest party gains seven seats compared with the current system and position, with other consequential adjustments following. The largest party remains under-represented based on its share of the party vote.
   6. *It is important to understand why some parties in the models gained seats compared with the 2019 election outcome. It is a mathematical inevitability given the necessity to deal with independents and their votes in a compartmentalised manner. The quota used in 2019 to determine the overall composition of the National Assembly was 43 485, whilst in the model, it is 43 144. The reduction is due to discarding the votes for independent candidates, which includes those for unsuccessful independent candidates (and could, in some models, have excess votes for successful independents). The fact is that more votes are discarded than the number of votes that were required for the independents to win their seats. The reduction in the number of votes to take into account is, thus, larger than the reduction in the number of remaining seats to be filled, leading to a lower quota. The lower quota, in turn, leads to some parties gaining more seats in the first round of the allocation of seats compared with the situation in 2019, and the rest follows in sequence based on mathematical logic*.
   7. In whatever model one constructs, intra-party proportionality will always be attained. However, it is clear that the better independent candidates fare, the more the overall outcome, whilst mathematically logical and correct, may become more challenging to follow. The Bill follows most of the concepts that apply to the municipal electoral system. There the presence of independent candidates has not noticeably stirred the water. That is mainly because independent candidates have received little support and have not distorted outcomes significantly enough to raise questions.
4. **Alternative Models**
   1. **Single-Member Constituencies**
      1. It is important to consider whether alternative models would result in what could be regarded as more proportional outcomes. To this end, refer to Annexures 5 and 6. They deal with the notion that 200 seats in the National Assembly should be filled from single-member constituencies as proposed as an option in the Ministerial Advisory Committee. That introduces the first past the post element where the winning candidate does not require an absolute majority - only more votes than the other candidates.
      2. The two Annexures attempt to construct models reflective of the outcome for single-member constituencies. The results of the 2021 municipal elections were used for that purpose, as it is also a two-tier compensatory system. The number and percentage of wards a party won are as close an approximation as could be made to arrive at the likely number of constituencies a party would win. Wards reflect geographic areas of support that are, primarily due to past and present spatial anomalies, areas of concentrated support. This phenomenon would likely also be reflected in constituency elections. The outcomes in this model can naturally not be directly compared with those in the other annexures since it uses a different dataset.
      3. The votes for independent candidates have been grouped in Annexure 5 even though their votes would be spread and the number of votes required to win a single member constituency would be much higher than the number they needed to win the 52 wards they did, based on the first past the post method, in the municipal elections. This aims at illustrating the maximum theoretical impact independent candidates could have - based on this dataset. The votes for other participating parties have also been grouped. They all have less than 0,25% of the party vote (some are local parties), and individually, none would qualify for a seat in the National Assembly. However, the votes they received must be considered when a quota is determined for allocating the compensatory list seats - only the votes for independents are excluded.
      4. The results arrived at in the model marked Annexure 5 (single-member constituencies) could be seen as more proportional than those achieved with the results arrived at in Annexure 3 (the Bill). The represented parties are all slightly, but not widely, overrepresented. However, the picture changes radically with the model marked Annexure 6. The same assumptions are used as in the model marked 5. Here the votes for a party with broad support but with this support not being geographically concentrated (it won fewer wards than the actual independent participants did) are now marked as the participation of independent candidates. The discarding of this large number of votes when the compensatory element has to be calculated leads to a much lower quota and an outcome, although mathematically sound, that will not be acceptable since a minority of votes leads to a majority of seats.
      5. A single-member constituency system is thus potentially at least as vulnerable to problems of proportionality as any other.
   2. **Proportionality Determined by Party Ballot Only** 
      1. Annexure 7 contains a model where the votes on the first ballot determine the outcomes in the regions, and the second so-called party compensatory ballot is used to restore overall proportionality. For this model, the identical dataset is used as in the model in Annexure 4. In this model, the regional votes are not considered when the compensatory list allocations are determined. Overall proportionality for 400 seats, minus those attained by independent candidates in the regional elections, must be filled. The regional seats are those attained in the 2019 election.
      2. The outcome of this model is not different from that resulting from the implementation of the provisions of the Electoral Amendment Bill and the largest party gains, in both instances, the same number of seats.
      3. Also, the largest parties are still underrepresented compared to their share of the party vote. To an extent, the party votes in the regional component that, in terms of the Bill, must be combined with the compensatory vote to determine overall party support may, with the assumptions in the model in Annexure 4, have been overstated in favour of the largest parties. Had actual data been available, the larger parties could have gained even fewer seats in the model in Annexure 4 thann in the model of Annexure 7.
      4. The model's outcome in Annexure 7 does not correspond with the expectations of this approach as expressed in the public domain.
5. **Provincial Elections**
   1. Annexure 8 contains a model, including votes attributed to independents, and it is based on the 2019 provincial legislature election in Gauteng. It yielded the same outcome. The number of parties represented in Provincial Legislatures is far less than the case of the National Assembly. It varies between four and seven, with five legislatures having only four represented parties. Thus far, smaller parties seem to have played a lesser role in provincial elections despite the quotas mostly being lower and even substantially lower than at the national level. It is only in Gauteng and the Western Cape that substantial quotas have been used in the past.
   2. The scenarios constructed in submissions to the Portfolio Committee and the NCOP about provincial elections are based on hypothetical data and assume great support for independent candidates. From a mathematical perspective, the conclusions reached in the scenarios are correct. At the same time, they contain assumptions for an independent winning a seat in more than one region and a provincial legislature with significant consequential effects on perceptions of proportionality.
   3. However, whether these scenarios are likely to occur is not the point. These extremes can only be avoided if an independent candidate is limited to standing in only one election. A two-ballot system with sub-regions is not the answer either. It will yield the same outcomes as the comparison in section 5 above.
6. **Comments on the Atkins Submission to the NCOP**
   1. The submission correctly states that the Bill “is based on the entirely illogical idea of individuals) independent candidates being on the same ballot as parties” and that “every problem with the Bill arises as a consequence of the fundamental problem”. These statements are correct. The reality of the inclusion of independents in proportional systems induces distortions to proportions.
   2. The submission proceeds from the premise that for the Bill to be fair and constitutionally compliant, it should result broadly in the same outcome as in 2019 if the same dataset is used for calculation purposes. This is logically and mathematically not possible. The reason is simple. If independents are (finally) awarded the seats they win in regional elections, and you exclude both those seats and the votes for independents from further calculations, then inevitably, the quota would be lower than it was in 2019 based on all the votes cast. Different quotas cannot give you the same results and the lower quota benefits parties. This is not because parties are given an advantage but because of the practical consequences of introducing independents.
   3. The submission proposes the following solution to restore a so-called acceptable level of proportionality: “The proportional representation seat allocation (400 seats, less the number won by independent candidates in regional elections) should be carried out solely on the basis of the proportional representation ballot, with the regional ballots excluded“ (own emphasis). The proposition for creating such a model is logical and correct. It is only the outcome that is not correctly projected. The reason is explained in the previous paragraph and the outcome is illustrated in Annexure 7.
   4. It is clear from the contents of the previous point that using two ballots cannot mitigate the distortions to proportionality that the participation of independents brings along. It does, however, deal with the issue of voters supporting an independent and having a second choice to support a party if they so choose. Every ballot cast influences the component (tier) of the electoral system it relates to.
   5. An individual cannot be elected more than once in the same legislature; thus, discarding excess votes for successful independents is a logical consequence. That parties do not have single but multiple candidates and that excess votes can therefore be “pooled” for other candidates is an equally logical consequence. It is a choice to stand as an individual or to represent a party.
   6. The submission is correct insofar as parties with more votes will mostly gain more seats with the first provisional allocation of seats than in the current system. It should, however, also be kept in mind that in both the models in Annexures 3 and 4, some smaller parties also benefit, albeit not to the same extent. In none of the models, except in a system of single-member constituencies, does the largest party gain more seats than its share of the party vote. The perceived advantage is a logical mathematical consequence that cannot be avoided and is not an engineered outcome.
   7. The submission is correct that the outcomes in provincial elections could be largely distorted in the event of multiple simultaneous successes by an independent candidate in more than one region and a provincial election. The proposal that a person may only stand in one election and region is also sound. If the accommodation for independents to have multiple candidacies is permitted to stand, then the potential outcomes are mathematically unavoidable.
7. **General Responses**
   1. **Payments of Deposit and Signatures to Evidence Support**
      1. The requirement for a monetary deposit to evidence serious intent to contest is well established. The Bill also makes it clear that a deposit paid by an independent must be less than that paid by a party that submits a list of candidates.
      2. In respect of signatures as a minimum requirement for candidacy, drafting that achieves parity in the treatment of candidates was proposed to the Select Committee. If it is accepted, it will impose similar requirements on unrepresented political parties to demonstrate support at the point when they nominate candidates. This is over and above the requirements for signatures that they must meet when they register as parties.

*“(c) In the case of a registered party not represented in a legislative body, a completed prescribed form confirming that the party has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear on the segment of the voters’ roll for each region or province in which the party has nominated candidates and who support the party, totalling at least 20 percent of the quota for a seat in the previous comparable election;”*

* 1. **Electoral Reform** 
     1. The Commission reiterates that the choice of an electoral system involves a national policy choice that cannot be relegated to an election management body. Rather, that the decision must be that of Parliament as a body representative of the people.
     2. The Commission remains available to contribute in a manner consistent with its constitutional obligations and as determined by Parliament.
     3. The exact nature of the national policy conversation on electoral reform is a matter whose institutional and operational modalities have to be worked out.
  2. **Whether it is possible to introduce constituencies in the time remaining before 2024 general elections**
     1. The position of the Commission is that it is not possible implement constituencies before 2024. Furthermore, it is not possible to use the “66 districts model constituencies”. This is so, because constituencies are required to have similar numbers of voters. It is also not possible to fit constituencies within the present municipal or district council boundaries without leading to so-called cross-border boundaries.
     2. Moreover, the boundaries for provincial constituencies could not correspond with the regional constituency boundaries for the National Assembly since there are more provincial seats than regional seats. The potential confusion for voters and administrators apart, this process will take time and the enactment of legislation to establish a body to attend to this task - mainly if an opportunity for objections is provided for proposed constituencies, which should be the case.
  3. **There is an error in the method to award a seat left vacant by an independent who had been elected to more than one legislative assembly**
     1. The Commission had on 9 November proposed a re-draft that ameliorates this. The proposed drafting implicates item 7 and 12 of Schedule 1A. If the re-draft is accepted, there will be consequential adjustments to item 23 and 24 of the same Schedule.

**7.5 Item 23(3)(g) of Schedule 1A is redundant**

The Commission accepts the submission and thus proposes deletion of item 23(3)(g) and 24(g).

1. **Conclusions**
   1. There is no alternative system that has been advanced that provides a more proportional outcome than that in the Bill. Smaller multi-member constituencies, whilst logistically not an option in the short term, would probably limit variations from complete proportionality but hold the same inherent problem that independents would still be a separate component with distortion impacts.
   2. While the compartmentalised nature of independents, their votes and seats may have a distorting effect on proportionality, intra-party proportionality is nonetheless maintained. The Bill thus ensures an outcome as proportional as mathematically possible.